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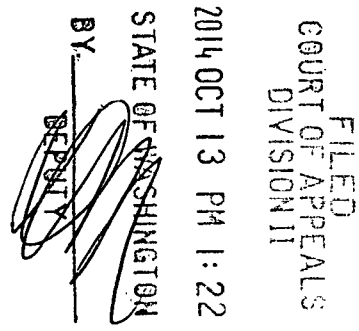

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

In re the Marriage of

JODI HESLIP,
Respondent

v.

FREDERICK HESLIP,
Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Dennis Maher, Judge Pro Tem

BRIEF OF APPELLANT

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I. INTRODUCTION

The Appellant, FREDERICK HESLIP, appeals the decision of the Cowlitz County Superior Court, which awarded primary care of the parties' minor child, M. H. to the Respondent in a Parenting Plan modification proceeding, as contained in the Order Re: Modification/Adjustment of Custody Degree/Parenting Plan/Residential Schedule (C.P. 180), and the Parenting Plan (Final Order) (C.P. 181), entered in Cowlitz County Superior Court on October 14, 2013.

II. ASSIGNMENTS OF ERROR.

A. The trial court erred when it ruled that it would apply only those facts and circumstances that occurred following the entry of the order of December 30, 2011, and not those that may have occurred following entry of the May 21, 2010 Parenting Plan.

B. The trial court erred in its application of the facts of this case to the underlying Parenting Plan Modification Statute, RCW 26.09.260.

C. The trial court erred in its application of the facts of this case to the underlying Relocation Statute, RCW 26.09.440.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court limited testimony to issues and facts that occurred after the hearing on temporary motions, instead of those that occurred after the entry of the order being modified. Did that limitation violate Appellant's trial rights on modification?
2. At a temporary hearing regarding adequate cause and relocation, the court makes findings regarding temporary relocation, and then orders a Family Court investigation and allows the matter to be set for trial. At trial, is the court limited by those findings made by the court on temporary orders?
3. At a temporary hearing, the Court determines that a parent has a history of domestic violence and is concerned about the possibility of future domestic violence, along with that parent's ability to remain in one home. At trial, 18 months later, that parent has shown stability, including employment,

having only one residence, and a lack of domestic violence in his home. At the same time, the other parent admits to having used a paddle to discipline the child. Does the trial court commit error when it fails to take into consideration this evidence in a modification and relocation trial, based upon the fact that the burden of proving the facts has been shifted to the non-moving parent?

III. STATEMENT OF THE CASE

The parties have one minor child born of their marriage, M.H. born December 14, 2007. M. H. was five (5) years when the October 2013 parenting plan was entered. Primary care of M.H. was granted to the appellant/father in the Final Parenting Plan entered on May 21, 2010. (CP 74). At the time, the mother had decided to relocate to North Carolina. She claimed it was to seek educational pursuits that she could not receive in Washington. The father claimed that it was because she had met another man and wanted to pursue that love interest. RP November 10, 2011 p. 24.

The father had previously been convicted of Domestic Violence in Cowlitz County, for an incident that allegedly

occurred in 2007. The conviction was in November 2007, and was clearly known to the mother when the May 21, 2010 order was entered. M.H. was born one month after the conviction. RP November 10, 2011 p. 9.

Both parents have other children living in Washington. The mother has an older son, C, living in Kalama. The father has three older children all living in the Pierce County area. It was deemed important by the parties at the entry of the May 21, 2010 order that M.H. have continued contact with C., his older brother. Accordingly, mother would travel back to Washington for visits with M.H. and C. This occurred approximately every three months.

Due to the Domestic Violence criminal conviction, father lost his employment with Weyerhaueser. He subsequently worked with various other employers trying to earn sufficient funds to support himself and M.H. On occasion, he would have difficulty paying bills, such as rent. He had to move on at least three occasions after the mother relocated herself to North Carolina, between May 2010 and October 13, 2011 when the mother filed her petition to modify the parenting plan. One

place he stayed at for three days, essentially house-sitting, while the owner was in the hospital. An additional location he stayed in for approximately a month while the child was visiting with the mother in North Carolina. RP November 10, 2011 pp. 60-63, pp. 101-102.

Following the entry of the 2010 order, mother was entitled to up to a week at a time with the child, in addition to a block of time during the summer. She did not take the full block of time in 2010, whether because she was adjusting to a new home and trying to get settled to attend school, or by agreement of the parties. Her first visit, in August 2010, was for only 4 days. Mother subsequently had visits of varying lengths until summer 2011, when she was able to have the child visit with her in North Carolina. During that time, she had no difficulty in reaching the child by telephone, except the occasional time when the father's telephone was not working.

By September 2011, father had expanded his job search to include Utah. He had been dating a woman from his faith (Jehovah's Witnesses) and was intending to move to Utah, find employment there, and marry. He wanted to move because

employment opportunities in Cowlitz County were scarce and he felt that the job opportunities in Utah were significantly greater. He told the mother in July 2011 of his intentions, including his intent to marry. The mother's response was anger and a demand that he fly his bride to North Carolina to meet the mother. RP November 10, 2011 p. 36, p. 90. RP July 18, 2013 p. 104.

After telling the mother of his desire to relocate with the child to Utah, the father hired counsel to begin the legal process of relocation. Unfortunately, by the time counsel had completed the paperwork, the father had already been served with a Petition to Modify the Parenting Plan, in October 2011. RP July 18, 2013 pp. 105-106. After serving the mother with his Notice of Intent to Relocate, the mother filed an Objection to Relocation. CP. 88, 95.

In his Notice of Intended Relocation, the father outlined the reasons for his need to relocate. They included the fact that he had lost his job at Weyerhaueser in 2008 and that since that termination he had been attempting to find a permanent job and had been unable to do so. He indicated that he had expanded

his job search outside of the Cowlitz County area and believed that he had found employment with a particular employer in Roosevelt, Utah. He indicated that the mother had moved to North Carolina in May 2010 at which time he was awarded primary care of M.H. in the May 2010 Parenting Plan. He indicated that the mother had seen the child fewer times and for less time than she would have been allowed in the Parenting Plan, and that her only ties to the Cowlitz County area were when she came back for visits with M.H. and C. He felt that similar transportation arrangements could be made for traveling out of Utah. M.H. was not yet in school, and did not have need for a day care. Finally, he asked that he not be required to provide to mother his telephone number and address due to previous threats by the mother. CP 88.

In the mother's Objection to Relocation, the mother outlined her reasons for asking the court to not allow M.H. to be removed from Washington. CP 96. Those reasons included the existence of her extended family in Washington and the possibility of increased cost of air travel to Utah as opposed to Washington. Id at p. 4. She claimed that the reason father

received primary care was because he had agreed to keep M.H. in Washington. Id at p.5. She claimed that it would harm the child if he was allowed to move to Utah as opposed to staying in Washington because it would not allow him to maintain the relationships with family in Washington, and that removing M.H. from his other familial relationships would be more harmful than removing him from his father. She claimed that the father had instability and an inability to care for the child. She claimed that the loss of his employment was due to his choices of committing domestic violence. She claimed that there was no proof of father's employment in Utah. Id at p.6. She outlined the father's eviction from at least one if not two possible residences. She admitted that she had been approached by the father in August (two months before she filed her petition) about the possibility of moving to Utah. Id at p. 7. She claimed that M.H. is a mixed race child and that the child would be harmed by being allowed to go to schools in Utah which were not as racially mixed as Cowlitz County or North Carolina Id. at p.8. She indicated that father's new significant other was only 27 years old (father was then 40) and would be

ill equipped to deal with possible future domestic violence or to adequately assist in parenting M.H. Id at p. 9. She claimed that an alternative to allowing the child to move to Utah was to place the child with her in North Carolina but did not explain how that would satisfy her concerns regarding maintaining the relationships with her extended family. Id. at p. 10.

Mother's Petition for Modification of Parenting Plan simply indicated that the child's present environment was detrimental to the child's physical, mental or emotional health. She referred the court to her declaration to outline the change of circumstances. CP. 77.

In her Motion and Declaration for Temporary Order, mother indicated concern for father's behavior. She indicated that he had had 4 or 5 jobs over the last year, had his car repossessed, had been evicted from 2 homes, and was couch surfing at other times, all with their 3 year old son. The indicated that he had recently refused to give her his address, that she was concerned that he may attempt to relocate to Utah in violation of the relocation statute, and that she was concerned that it would be more difficult to "keep tabs on my

son's wellbeing" in Utah due to issues in Cowlitz County. She indicated that she was married, had a full time job, and was a student in North Carolina and that she therefore had a stable environment for the child in her home. CP 81.

The Court set the matter for original hearing on October 28, 2011. At that hearing, the Court found adequate cause because of the Notice of Relocation and set a hearing on the issue of relocation. CP 108, RP October 28, 2011 p.3. The Court refused to allow the child to be removed from Cowlitz County prior to the hearing on temporary relocation. RP October 28, 2011 p. 9.

The Court first took up the temporary relocation hearing on November 7, and then on November 10, 2011, before Judge Michael Evans. The court originally noted that the hearing was for relocation of the child. RP November 7, 2011 p. 2. Mother's counsel argued, incorrectly, that the previous judge in the October 28, 2011 hearing had found adequate cause due to the Petition for Modification. Id at p. 4. After argument, the court determined that he was hearing both the relocation and temporary orders on the modification. Id at p. 8.

Mother called several witnesses at this hearing. The first, Cecil Irons, was the owner of property where father lived for a period of time. He testified that father had been evicted from the home in June 2011 for failure to pay rent and failure to maintain utilities. He indicated that he locked up possessions in the home until contacted by the father for their return. Id. at pp. 27-29. He admitted that he did not have direct contact with the father and relied on a rental agent who quit his employ after the father was evicted. Id. at 30-31, 37.

The second witness, Karri Wheeler, had originally rented to the parties prior to the dissolution of their marriage. She indicated that she and the father had a relationship at one time and so she had father and M.H. move in with her. Id. at 39. She indicated knowledge as to the several changes of homes that father had to make because of financial problems. Id at 40. She described an incident where she claimed that he threw her on the bed. Id at 42. She discussed repossessing a vehicle from the father, and using scissors to try to cut the keys out of father's shirt pocket while the father had the child in his arms. Id at 44, 46.

The third witness was the mother herself. She testified that she had relocated to North Carolina to better herself, get a better education and to see what other opportunities were available for her outside the State of Washington. Id at pp. 55-56. She indicated that she felt that father should not have the child because of "his instability as far as losing jobs and losing homes, the domestic violence altercations between him and his girlfriend after me." Id. at 57, 67. Father had also recently made telephone contact between her and M.H. difficult. She described coming back to Washington to visit with M.H. and C. for 3-4 days at a time. At one time, when picking up M.H., she described father's house as messy with several loads of laundry all over the living room. Id. at 64. She described coming home after one of the visits and M.H. crying to the point that father had to come to the car to calm M.H. down. Id. at 67. She described father providing a false address to her when she had come to Washington to take M.H. back to North Carolina for her September/October 2011 visit, where father had delivered the child to the maternal great-grandmother for the mother, while he went to Utah to visit his significant other.

Id. at 71-73, 76. She described how, after her last visit in October, she had not been able to speak with M.H. by telephone as father had asked for telephone calls to be on a schedule. Id. at 77. She indicated that she felt the travel expense would be increased to fly to Salt Lake as opposed to Seattle for her visits to Washington to see C. Mother admitted that, prior to filing her Petition for Modification, father had discussed the possibility of moving for Utah for employment purposes. Id. at 92-93. She admitted that she allowed him custody of M.H. knowing that he had previously been convicted of domestic violence. Id. at 94. She indicated that father had always encouraged the relationship between M.H. and the mother's family. Id. at 102.

The parties had a colloquy regarding mother's previous diagnosis of Bi-polar disorder and a police report from 2005 where the mother is quoted as saying that she was going to kill the father. The court denied their admission as having occurred prior to the child's birth. Id. at 113-116.

The father also called several witnesses. The first was Mark Kuning. During his testimony, mother's counsel admitted

that mother had never had any issues with father's ability to parent, including his love and care of the child. Id. at 118. Mother's counsel further argued that the court could not hear testimony as to mother's fitness to be M.H.'s primary caretaker. Id. at 120. The court allowed the testimony. Mr. Kuning indicated that he had known the father since 2006, and the mother since birth, through their church. He indicated that he assisted father in Bible study, and had witnessed the father's relationship with M.H. He described M.H. as very well-behaved, and that father was an "Excellent dad." Id at 121. He indicated that the child had blossomed in father's care, was intellectually superior to other children his age, and showed great love and affection for his father. Id. at 122-3. He described issues with the repossession of father's truck by Ms. Wheeler. He described Ms. Wheeler as being an angry individual. He also described having issues communicating with mother, in particular a time when father had him contact mother about a visitation exchange issue and mother was upset that father had not called (Father could not call because of a restraining order). Id at 126. He described mother's previous

anger abuse issues. Id at 127. He indicated that father was a more attentive parent, and that M.H. would often bear the brunt of mother's anger at father. Id at 129. He was aware that mother intended for the father to lose his job at Weyerhaueser over the issue of domestic violence as a means of controlling father.

Mr. Kuning described a series of events where mother undermined father's ability to maintain his insurance business, such as making the father cancel appointments to pick her up, then coming to the office to pick a fight with the father while he had customers present, to serving him with divorce and restraining orders while at work. Id. at 130-134. He indicated that there was never a time after the May 21, 2010 order that M.H. did not have a place to live. Id. at 140.

Father also testified. He described the residential care arrangement prior to mother's move to North Carolina as being an equal split (7 days on and 7 days off). She came to him with the idea of moving to North Carolina, but he resisted in having M.H. go. She decided to go anyway as "this was her one chance at true love." Id at 146-7. He indicated that the

discussions never revolved around C., and that the mother wondered if he would move north to be closer to his children in Tacoma and that she had no problem with him moving anywhere within the state. Id. at 148.

Father described the problems that occurred between him and the mother at his insurance business. Id. at 150. He described being evicted from the home owned by Mr. Irons, indicating that he had set up a promissory note with the property manager, who then would not call him back after she changed the locks on the door. Because she would not communicate with him, he had difficulty recovering his items. Id. at 152-4. He described having to move from one house on Ross Avenue to another on South 7th because the mother had filed a restraining order against him. Id at 155-6. He described moving into Ms. Wheeler's home at her request to help with finances. He described the incident related by Ms. Wheeler that she described as domestic violence to being an incident where she was upset and he attempted to tickle her to calm her down. He described Ms. Wheeler coming at him, on another occasion, while he was holding M.H., to use scissors to cut his shirt

pocket to get the keys to the truck. He also described the incident regarding the repossession of the truck. He indicated that she used a kitchen knife to slash the truck tires and then filed an insurance claim on the damage. Id. at 158-162. He described moving from Ms. Wheeler's home in August of 2010 to the Iron's home on South 10th, where he resided until June 2011. He indicated that he then spent about a month and a half at a home on Pine Street owned by Rita and Ernie Emerson, while the mother had M.H. in North Carolina from June 27 to July 27, 2011. He indicated that he stayed there to save up some money. He indicated that Rita had previously provided day care for M.H., but that he disapproved of her lack of help in potty-training M.H. He then moved from the Pine Street home to Ash Street, which was then his current Cowlitz County address. Id. at 163-6.

Father described renting a home in Utah where he would like to reside because he had a job waiting for him there. He described the home as being three-bedrooms, a fenced yard, and being next door to his church. He indicated that he was starting a job in Utah as a safety compliance officer at a salary

of $72,000. Id. at 166-7. He described discussing the possible move with mother, and that she became irate and demanding. She wanted to meet the younger woman and have her fly to North Carolina to meet her. He described the employment situation in Utah as booming with energy companies who were looking for people with his educational background. Id at 168-9. He described losing his job at Weyerhaueser due to the domestic violence issue. Id at 170. He described having several different jobs to provide financially for his son. Id. at 171-4.

Father described incidents of the mother breaking his cell phone. RP November 10, 2011 p. 3. He indicated that the mother had told him of her bi-polar diagnosis, and that when she was off of her pills, her mood swings were more frequent and she was more irritable. Id. at p. 8. He described an incident where, while he has driving with the mother and child in the vehicle, the mother got upset with him and back-fisted him in the eye. Id. at p. 11. He described scenes she would create in front of his clients and customers. Id. at p. 12. He indicated that Ms. Wheeler lied in her testimony because she wanted to date

him and have contact with M.H., and he did not want to be around her. Id. at p. 14.

Father testified that transportation from North Carolina to Utah is actually cheaper than into Washington. Id. at p. 19. He agreed that M.H. and C. should continue to have a relationship, but that the only time it had happened was when mother got them together because C.'s father would not cooperate with him. He described the evolution of his contact with M.H. prior to the original parenting plan, from mother withholding M.H. for three and one half months to having split care prior to her move. Id. at pp. 22-3. He indicated that mother did not raise the issue of her education until after she raised the issue of the new boyfriend in North Carolina. Id at p. 25. He indicated that mother's visits in 2010, in August and November, were shorter than she was to be allowed, by her choice. Id. at p. 28.

Father described his relationship with M.H. as being a serious blessing, that M.H. is smart and has a big heart. He indicated that he potty-trained him, taught him his ABC's, has been teaching the sounds of letters and numbers. He indicated that M.H. has never gone without food, clothes and a roof over

his head. Id at pp. 31-34. He described that M.H. missed him while he was with the mother, based upon the mother's calls to him indicating that, on visits with her, M.H. would wake up in the morning asking for his father. Id at p. 112.

He indicated that mother, prior to filing for the modification, would call M.H. maybe once per week, but after the filing would call an "abnormal amount of times." Accordingly, he asked her to set a schedule of times when she could call and know that she could contact M.H. Id at p. 35, 114. He indicated that mother's lack of telephone contact after the filing was by her choice. Id at p. 77. See also RP July 31, 2013 at p. 47.

Father indicated that he did not want M.H. to live in a violent home. He indicated that there was no reason to believe there would be violence in his home in Utah, RP November 20, 2011 at p. 71 and that M.H. was excited about the possible move to Utah. Id at p. 44.

Father indicated that he had been hired by a Robert Campbell at Weatherford International in Roosevelt Utah. Id, at p. 93. He had to meet with Mr. Campbell at 8:00 a.m. on

November 1, 2011. He had no question in his mind that he had been hired. Id. at p. 118-9.

At the end of the second day of the evidentiary hearing, the court allowed the father to take M.H. to Utah pending further court order. Id. at p. 150.

Court reconvened in this matter on December 1, 2011. Robert Campbell was called to testify by mother's counsel. He indicated that father was not yet employed but was in the interview process. He had indicated to the father that he was the number one candidate and that they were hoping to hire by November 1, 2011, but that it had not been able to happen. RP December 1, 2011 at pp. 7-10.

After hearing testimony and oral argument of counsel, the court made its findings. The court weighed the competing causes, finding that, on a modification, the court is to focus on whether there has been a substantial change of circumstances and whether the child's present environment is detrimental to his physical, mental, and emotional health and whether the harm likely to be caused by removing the child from the father's home is outweighed by the benefit of a change to the

mother's home. He compared it to the relocation statute, which focuses on the best interests of both the child and the primary parent. He found that they all lead to a "best interests of the child" standard. Id at pp. 47-8.

The court found that the domestic violence issues preceded the filing of the original parenting plan. He found that there was a pattern of domestic violence. He found that there was some instability regarding father's employment, partly due to the economic woes of Cowlitz County, but that it appears that, where father plans to move in Roosevelt, Utah, the economy is going well. He found that the father had 5 to 7 moves in 18 months, which was not a positive thing for M.H. He found that father's former relationship was volatile. Id. at pp. 48-9. He found the father took no responsibility for his role in that domestic violence. Id. at p. 50.

The court found that father had not been truthful about being currently employed by Mr. Campbell. Id at p. 49.

The court weighed the relative stability of the mother's home in North Carolina and the father's home in Utah. He found that mother was married and had a home. He found that

information was lacking as to father's home in Utah, as the rental agreement provided to the court had little to no information in it. He found that, with father not having a job at that time, his situation in Utah was no better than the situation he was in while in Cowlitz County. Id at pp. 51-52.

The court was concerned about father's unwillingness to provide an accurate address for the child when the petition was filed. He was concerned that, if father was willing to do that and willing to tell the court something about a job that was not true, that it gave the court concern. Id at p. 55. The court found that M.H. was not in any physical danger and that he had been fed and clothed. He focused on the child's mental and emotional health and what the instability of moving would do to M.H., along with the issues of domestic violence that may "raise its head in the future". Id. at p. 56. He found that there had been a substantial change of circumstances and found that it was due to the instability from the father's loss of his job. Id. at 57. The court therefore changed the temporary primary custodian to the mother. Id. at p. 58. The court ruled that this was a temporary order and referred the parties to Family Court

for an investigation. Id. at p. 59. The court indicated that "It is a temporary order and the Family Court will do an investigation. There most likely will be a trial and on this matter" and the issues heard at the evidentiary hearing will be sorted out. Id. at pp. 66-4. The court entered findings and order from the hearings on December 30, 2011. CP 110.

Trial in this matter began on July 11, 2013 before Judge Pro Tem Dennis Maher. Father asked to continue the trial so that his newly hired attorney could appear. RP July 11, 2013 p. 2. After argument, the court denied the father's motion for a continuance. Id. at pp 3-17. There was no indication that father had approved in writing for the court to act as a judge.

The court set ground rules for the trial. He indicated that they were not there to re-litigate the plan entered in May 2010 and not to re-litigate the temporary parenting plan entered in January 2012. He indicated that he would only listen to evidence about what had happened since the entry of those orders that make those rulings no longer in M.H.'s best interests and whether the father's relocation request should be granted. Id. at p. 43. See also Id at p.141.

Mother testified that, since M.H. arrived at her home in North Carolina, he had become stabilized, happy and had made friends. Id. at 47. She indicated that father had visited only one time since the transition, in August 2012, and that he had provided little notice that he was going to be there. Id. at p. 49. At then end of the visit, she heard from father that he had called the police and CPS regarding physical abuse in her home, from a paddle used by both her and her husband. Id. at pp.51, 106, 111-113. She indicated that, after father told her of his allegations, she threw away the paddle. RP July 18, 2013 at p. 6. CPS investigations occurred with no findings. Mother filed for contempt to force father to return the child, and father filed a motion to keep the child due to the abuse. CP 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 136, 137, 138, 140. The court found the father in contempt and ordered the child's return. The court further ordered that there be no corporal punishment of the child. RP July 11, 2011 at p. 55. The court also ordered M.H. to attend counseling Id. at p. 58. Father did not provide his choice to mother so she chose the counselor.

Mother indicated that father's telephone contact with M.H. was sporadic. Id. at p. 65. She indicated that she supervised the calls between M.H. and his father. She desired to limit father's calls to once per week. Id. at p. 66. Mother changed her telephone number in May 2012 and provided that information to her attorney. Id. at p. 119. She does not pick up the telephone when it rings and it is an unknown number. Id. at p. 120. She has the telephone on speaker phone to allow her to supervise the calls. RP July 18, 2013 at pp. 40, 85, 97.

Mother asked the court to follow the report of Family Court. CP 145, RP July 11, 2013 at 72, 75. Mother indicated that father has been an absent parent in the child's life, as father did not participate in the Family Court process.

Mother indicated that father had several opportunities to visit, but only visited in August 2012. Id. at p. 76. She admitted telling M.H. that father was a liar. Id. at p. 91.

Between the date that mother received M.H. from father in January 2012 and September 2012 after father's visit, she had not taken M.H. to see a dentist. The child had come back

from Utah complaining of tooth pain. Father had taken the child for a root canal. Id. at p.116.

At the start of the second day of trial on July 18, 2013 counsel and the court had a long colloquy as to the breadth of the evidence the court would receive. Counsel for mother argued that the court was limited to hearing testimony as to what may have occurred after the findings were entered on December 30, 2011 after the evidentiary hearing. Father's counsel argued that the court was required by statute to hear evidence regarding the change of circumstances after the May 21, 2010 entry of the Parenting Plan, and whether relocation of the child to Utah was appropriate. RP July 18, 2013 pp. 12-25. The court ruled that the only testimony he would rely upon was whether there had been a change of circumstances since December 30, 2011.

Mother admitted that father had not committed any domestic violence against her since 2009. Id. at pp. 25-6. She indicated that she had moved once since receiving M.H. in January 2012. She was unaware of whether father had moved during that time. Id. at p. 34.

The court had ordered after the contempt proceeding that the child was to be enrolled in a day care or pre-school at least one day per week. This was so that, if the child was abused in North Carolina, there would be a mandatory reporter to CPS. Mother did not comply with that order. Id at pp. 56-7.

Father also testified at trial. He indicated that, since moving to Utah in November 2011, he had not relocated and had remarried. Id. at p.103. He indicated that he had told the mother of his plans to move to Utah and why he wanted to move, during the time that she had summer visitation with the child in 2011. Id. at p. 104. One of the companies that he was interviewing with had told him that he would be hired but then did not. This was at a time that he had been unemployed in Washington for about two months. Id at p. 106.

Father indicated that he had no trouble early after the mother received the child making contact with M.H. by telephone. After a period of time that number changed or was disconnected and he was not given a new number. When he did get the new number, no one would answer and the phone indicated that the voice mail had not been set up so he could

not leave messages. Id. at pp. 110-3, 121. He would call the mother from several different phones, several of which, if they were attached to his employment, were blocked numbers. Id. at p. 131, 134. It also became more difficult to contact M.H. by phone the closer they got to court dates. Id. at p. 185.

The father indicated that, when he got his visit in August 2012, he flew with the child from North Carolina to Denver, and drove home with the child from Denver. During that drive home, the child related issues about nightmares regarding monsters and being scared. The child later related those nightmares to being with his mother and stepfather, and related how they used a red paddle to spank him. Based upon those statements, the father sought intervention from the police, CPS, and an order granting that the child not be required to return back to North Carolina. That motion was denied. Id. at pp. 125-130, 133-136.

Father indicated that he was not given the court's order from December 30, 2011 by his then counsel, Mr. Sternagel. He ended up receiving it from his second attorney. Mr. Roe, in July 2012. RP July 31, 2013 at p. 8. This was when he found

out that the court had appointed a Family Court investigator. He never received any documents from Family court or the investigator, Mr. Doolin asking for information. Id. at pp. 9-10, 18. Accordingly, as he did not know that the investigation was ongoing, he did not participate in that investigation. The investigator spoke only with the mother and the maternal grandmother. He did not speak with anyone else, including the child's previous day care provider Id. at p. 66, or to Karri Wheeler. Id. at p. 72.

The investigator's report was that the mother indicated that father was never violent toward the child. Id. at 23, CP 145. Father had become aware of violence toward the child in the form of spankings by the mother and step-father using the red paddle.

In regards to the December 30, 2011 order, the father denied that he had ever struck Karri Wheeler. Id. at 39. Ms. Wheeler testified that, during the incident previously testified to, the father did not throw her on the bed in anger. He was not mad. He was laughing and tickling her in order to cheer her up. Id. at p. 74. She further indicated that the mother induced her to

testify for her by promising that her that she would be able to continue to see M.H. whenever the mother brought him into town. She has not seen M.H. since the temporary orders hearing. Id. at p. 80.

Father indicated that, when he had M.H. for his summer visit in 2012, mother was able to contact M.H. by telephone 2-3 times each week. The mother would discuss the case with the child. Id. at p. 51.

At the time of trial, father had just begun to work for Newfield Exploration. He worked for Cameron International from January 2012 until July 2013. Id. at pp 95-96.

Father's new wife also testified at trial. She indicated concerns about making telephone contact with M.H. Id. at p. 185. She indicated that there has been nothing even remotely resembling Domestic Violence in their home. Id. at p. 214.

After trial, the court awarded primary care of M.H. to the mother. CP. 176. The father timely appealed.

IV. ARGUMENT

A. Standard of Review:

The determination of a parenting plan must be in the best interest of the child and based upon the statutory criteria set forth in RCW 26.09.184 and 187. The trial court has wide discretion and latitude in making this determination. In Re the Marriage of Kovacs, 121 Wn.2d 795, 854 P.2d 629 (1993) However, a trial court's decision will be reversed for abuse of this discretion. The trial court's Parenting Plan in this case was not in the best interest of the child and should be reversed as an abuse of discretion.

Errors of law are reviewed de novo. In incorrect shifting of the burden of proof is an error of law. Marriage of Fahey, 164 Wn.App. 42, 262 P. 3d 128 (2011).

B. The Trial Court failed to Correctly Apply RCW 26.09.260.

RCW 26.09.260 provides, in relevant part, that:

> "The court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

> (2). In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:
>
> © The child's present environment is detrimental to the child's physical, mental or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child."
>
> RCW 26.09.260 (1), (2), ©.

Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification. In Re Marriage of Taddeo-Smith and Smith, 127 Wn.App. 400, 100 P.3d 1192 (2005). See also, Welfare of R.S.G., 172 Wn.App. 230, 245, 289 P.3d 708 (2012). Under RCW 26.09.260, a trial court shall not modify a custody decree unless it finds, based on facts arising since the previous plan was entered or facts that were unknown to the court at the time the previous plan was entered, stat a substantial change in circumstances has occurred in the life of the child...., such that modification is in the child's best interests and is necessary to serve those interests. R.S.G, at 246.

At the time the Petition for Modification was filed in this matter, the child had been living with the father in Cowlitz County. It is not disputed that father was having financial difficulties, partly due

to the circumstances in the economy and the loss of his employment with Weyerhaueser. Those circumstances were clearly known to both parties. Immediately after the modification petition was filed the father filed his Notice of Relocation, alleging that he had a home to move to in Utah, that the economic circumstances in Utah were more favorable than they were in Cowlitz County, and that he believed he had found employment in Utah. It is clear now, and was clear to the court at the time of the hearing on temporary orders, that father had not yet been hired for that new employment. But it was also clear that, at the time for trial, father had been employed in Utah with a substantial income for over 18 months.

In addition, mother's petition indicated that father had moved on several occasions prior to her filing. The court, at the hearing on temporary orders, also made that finding. However, also by the time of trial, father had become well established at his new home in Utah, having lived there for the 20 months between the time of his relocation in November 2011 and the trial in July 2013.

Mother's petition further indicated that father had a history of domestic violence, and argued that his proclivities continued. The court, at the temporary hearing found that he had a history, including

a conviction for a time period prior to the child's birth. The court further found that father's relationship with his former significant other was troubling, and speculated that father's relationship with his then new spouse may also be fraught with those issues. However, by the time of trial, father and his new wife had not experienced any issues of domestic violence.

Mother at trial and in her pleadings indicated that she had no fear for the child's safety in the father's home. The court, at the temporary hearing, also found that the child's physical well being was not in danger. However, in the mother's home in North Carolina the mother and step-father employed spanking with a red paddle as a means for punishment. When confronted with this issue and the emotional turmoil that the issue placed the child in, the mother threw the paddle away, to avoid further complaint.

When taken as a whole, the father's circumstances at trial were actually better than they were at the time of the entry of the parenting plan. The father had steady employment. The father had been living in a home for a significant period of time. The father's relationship with his significant other or spouse was devoid of any issues of domestic violence. The father's home, unlike the mother's home, had no issues

of physical violence to the child. On the basis of these circumstances, the trial court should have found for the father and returned the child to his father.

C. The Trial Court Failed to Correctly Apply RCW 26.09.520.

RCW 26.09.520 provides in relevant part:

> The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted....

The statute goes on to provide 11 factors that are to be weighed by the court in determining whether the relocation should be allowed. Those factors are not weighted, and the statute provides that no inference is to be drawn from the order in which the factors are listed.

In this matter, father proposed to move to Utah from Washington for several reasons, not the least of which was employment opportunities and to unite with his significant other, whom he married prior to the final hearing on temporary orders. The mother, who had previously moved to North Carolina, fought the relocation for several reasons, chief among which were the alleged increased costs of transportation between Utah and Washington, and

the desire to maintain contact between M.H. and his half-sibling, C. and the rest of her extended family.

The analysis for a relocation matter is not simply the best interests of the child, but the best interests of the child and the relocating person. Marriage of Kim, 179 Wn.App. 232 (2014). The statute creates a rebuttable presumption that the relocation will be allowed, which may be rebutted when the objecting party proves that the "detrimental effect of the relocation outweighs the benefit of the change to the child **and** the relocating person (emphasis is this writer's). See also, Marriage of Fahey, 164 Wn. App. 42, 262 P.3d 128 (2011).

In this matter, the court, at trial, indicated that he was looking at both the modification and the relocation. Applying the standards of a relocation matter to the above facts, the court can only find that the father had become far more stable in his relocated home in Utah than he was in his prior home in Washington. The court at the temporary hearing himself concluded that part of father's issues in Washington were the added stressors that can come from being unemployed. Those stressors include wondering where a person will be able to reside. The court at the temporary order hearing found that the father

had met the child's physical needs, but found that the moves could have taken an emotional toll on the child. However, that court, and the trial court, did not take into consideration the emotional upheaval that leaving the father would have for the child. This was found in the several calls that mother had to make to the father to have the child calm down, at the end of a visit by the mother, at the transition from the father to the mother in January 2012, and the emotional trauma that the child faced by being physically abused by spanking in the mother's home.

The court at trial did not make findings as to the 11 factors. If it had done so, the court would have found that the father's employment was stable. He was earning a substantial income. It would have found that the father's housing in Utah, especially in comparison to his housing in Washington, was stable, in that the father had not moved from his one home in Utah. It would have found that the issues of Domestic Violence, if they had been existent in Washington after the mother relocated herself to North Carolina, were non-existent in Utah. The above circumstances were the exact reasons for the enactment of the relocation statute, which was to allow the relocating parent to

move with the child to a location that was far superior to the prior home.

This is not to even take into consideration the mother's actions post-temporary order. In addition to the spanking of the child, the mother withheld telephone access to the child wrongfully. The court at the temporary hearing referred to father's failure to provide telephone access to the mother after the filing of the petition. Yet mother, within months of receiving the child in January 2012, proceeded into a similar endeavor by not only withholding access to the child (she failed to answer the telephone if the caller identification said unknown caller during times that the father would normally call), but also supervised those calls without court authority.

Finally, the court allowed the mother to remove the child to North Carolina, fully 3000 miles away from mother's extended family. Other than C., who the mother could fly back to North Carolina for visits, there was little to no indication that the mother had continued to allow contact with her extended family. This was an issue that she raised in her objection to the father's relocation. Yet the facts show that she herself did not provide increased access to her extended family than could have been provided by the father.

The court erred when it failed to provide specific findings as to the 11 factors, and when it failed to recognize the obvious benefit that relocating to Utah had provided to both the father and the child.

D. The Trial Court Erred in Limiting the Facts at Trial to Those that Existed After the December 30, 2011 Entry of Temporary Orders

The trial court, at the beginning of the trial in July 2013, specifically ruled that he would not allow testimony that related to matters that occurred prior to the evidentiary hearing that led to the entry of the December 30, 2011 order. RP July 11, 2013 at pp. 43, 141. It reiterated this ruling when counsel was able to appear for trial on July 18, 2013. RP July 18, 2013 pp.12-25.

A parenting plan is a "plan for parenting the child, including allocation of parenting functions, which plan is incorporated in any final decree or decree of modification in an action for a dissolution of marriage or domestic partnership, declaration of invalidity, or legal separation." RCW 26.09.004(3). A motion to modify a parenting plan is just that, a motion seeking to modify a parenting plan. RCW 26.09.270. The motion includes "an affidavit setting forth facts supporting the requested ...modification." Id. A motion to modify a parenting plan is not a parenting plan. The "prior plan" for RCW

26.09.260(1) purposes was the parties' original parenting plan. Marriage of Zigler, 154 Wn. App. 803, 811, 236 P.3d 202 (2010).

In a modification proceeding, the court is required to allow its inquiry to any and all circumstances that occurred following the entry of the parenting plan being modified, unless there were other circumstances that were unknown to the court at the entry of that plan.

The trial court, in limiting its inquiry to the circumstances following the entry of the temporary order of December 31, 2011, committed an error of law. In that circumstance the standard of review is de novo by the appellate court to determine the correct legal standard. Marriage of Fahey, 164 Wn.App. 42, 55, 262 P.3d 128 (2011).

If the trial court had followed the law and allowed all testimony, the court would have found that the father had only been arrested for domestic violence prior to the entry of the May 21, 2010 parenting plan. This information was known to the parties and would have been known to the court at the time of entry. While father had a relationship with Ms. Wheeler that could easily be termed tumultuous, at trial the father had remarried and there were no indications of domestic violence in the nearly 20 months of their marriage.

The court would have also heard that father had at most 3-4 residences with the child prior to the filing of the modification petition. After he moved to Utah, there had been no moves from the original residence.

The court would also have heard that the father lost his job at Weyerhaueser after the company found out about his domestic violence conviction. It would have taken into consideration the considerable efforts that mother made, prior to her move to North Carolina, to frustrate the father's ability to have secure employment. It would have understood that father had been unemployed for two months prior to the filing of the petition, but had made significant efforts to find employment in Utah, part of which were frustrated by having to attend court hearings in Washington, and part of which it can be inferred that the employer that father thought he had at the time of the temporary evidentiary hearing declined to hire father due to the constant interrogation by mother's counsel.

The court would also have heard that father had significant other people in the community, from the day care providers to helpful friends in his church, who could and would help him to ensure that the child's needs and interests were met. It would have heard and

understood that the child had never been abused or spanked in the father's care but that, within months of being transferred to the mother, was not only being spanked for crying, but was being beaten with a red paddle, one which mother immediately rid herself of when she heard that its use was problematic.

By limiting its inquiry, the court did not get a full picture of whether a change of circumstances in the child's or father's life had occurred from the date of the May 21, 2010 parenting plan to the time of trial. In essence, the ruling changed the mother's burden of proving a change to father's circumstances to requiring that father prove a change to mother's circumstances, because it focused on the time period after the entry of the December 30, 2011 Temporary Parenting Plan. This was aberrant to current law and is in error.

V. CONCLUSION

The trial court committed error in several respects. By limiting its inquiry at trial to the time period following the entry of the December 30, 2011 temporary order, it unduly restricted father's ability to argue and prove his case and shifted the burden of proof. The case law and statute clearly provide that the inquiry is a change of

circumstances from the entry of the Parenting Plan being modified, and not from the time of temporary orders.

If the court had correctly followed the law on both the issues of modification and relocation, the court would have found that there was little benefit to placing the child with the mother and substantial detriment from removing the child from father's care. Further, it was proved at trial that father and, arguendo the child, had benefitted and would have benefitted substantially from the relocation to Utah.

The court should reverse and remand, placing the child with the father in Utah, allowing the relocation, and reinstating the May 21, 2010 Parenting Plan. In the alternative, the court should reverse and remand for new trial.

Respectfully submitted this 13th day of October 2014.

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CERTIFICATE OF SERVICE

I, Nicholas R. Franz certify under penalty of perjury and the laws of the State of Washington that on October 13, 2014, I caused to be served a copy of the above document entitled "BRIEF OF APPELLANT" on the interested parties in this action, by United State, First Class Mail, Postage Pre-Paid and email, addressed to the following:

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DATED this 13th day of October 2014 at Tacoma Washington.

Nicholas R. Franz